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Contracts—Illegal Performance as Bar to Recovery—Public Policy.—McConnell v. Commonwealth Pictures Corporation

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in the instant case smacks more of a "requirement" than a "suggestion." For this reason the soundness of the holding is questionable. Until the case is reversed, if ever, an offeror in Michigan, desirous of not being contractually bound except by a written acceptance would do well to adopt the strongest possible contract language indicative of a lack of efficacy of any other method of acceptance. Probably the words "prescribe exclusively a written acceptance" would be effective in view of the court's usage of these terms.[7]

Under § 2-206 of the Uniform Commercial Code[8] the result would probably be the same as that had in this case. While the Code language does not absolutely exclude the possibility of restricting an acceptance to a single designated mode, the Commissioners in their comments have indicated that the purport of § 2-206 is to reject "the artificial theory that only a single mode of acceptance is normally envisaged by an offer."[9] They have also indicated a desire that the section shall remain flexible.[10] Let the offeror beware!

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Contracts—Illegal Performance As Bar To Recovery—Public Policy.— ***McConnell v. Commonwealth Pictures Corporation.***[1]—In an action for an accounting an agent sued his principal on a written agreement providing that upon successful negotiation of a contract for the principal with a motion picture producer, the agent would receive an initial fee and in addition, a percentage of the principal's gross receipts from distribution of the pictures. The principal in his answer alleged that he had paid the initial fee, but had refused to perform further upon learning that the agent had obtained the contract by bribing an employee of the producer, contending that because of the illegality of the agent's performance,[2] recovery

benefit of the offeree. This case has yet to be reconciled with Pioneer Box Co. v. Price Veneer and Lumber Co., supra note 5). Wales Adding Machine Co. v. Hurer, 98 N.J.L. 910, 121 A. 621 (1923).

7 Allied Steel and Conveyors, Inc. v. Ford Motor Company, supra note 1, at 910, 911.

8 UCC § 2-206 Offer and Acceptance in Formation of Contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

9 UCC § 2-206, Comment 2.

10 UCC § 2-206, Comment 1.

1 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (Ct. App. 1960).

2 N.Y. Pen. Law § 439 makes it a misdemeanor to give, offer, or promise to an agent of another any gift or gratuity whatever without the knowledge and consent of the principal, with intent to influence such agent's action in relation to his principal's business.

was barred. An order by the New York Supreme Court, Special Term,[3] granting the agent's motion to strike the principal's defense was affirmed on appeal to the Appellate Division,[4] but was reversed by the Court of Appeals.

As a general proposition, courts will not allow recovery on an illegal contract.[5] But where the contract is not illegal on its face, that is, where its formation is not prohibited by statute or public policy, or its terms do not call for an illegal performance, there is authority to the effect that illegal performance will not bar recovery if such was not clearly within the contemplation of the parties at the contract's inception.[6]

This position, although limited by more recent cases,[7] was adopted in New York in the case of *Dunham v. Hastings Pavement Co.*[8] There the Court held in an action on a contract for services to be rendered in obtaining a franchise, that the trial judge erred in not submitting to the jury the question of whether the proof of acts done in performance showed that the parties' intent on entering into the contract was that illegal acts were to be performed; such was error because if the jury found such not to be the fact, the contract would be enforcible despite the illegal acts which occurred in performance.

Commercial bribery is illegal at common law[9] and constitutes a misdemeanor in New York under Penal Law § 439. Courts hold that bribery is such illegality as will bar recovery both on a contract obtained thereby,[10] and on one calling for bribery in obtaining an agreement.[11]

The situation in the present case, however, falls into neither category. The contract was perfectly legal and anticipated a legal performance, which subsequently proved to be illegal. This would bring it squarely within the rule recognized in *Dunham*. However, the majority of the Court felt that

[3] 1 Misc. 2d 751, 147 N.Y.S.2d 77 (1955).

[4] 7 App. Div. 2d 905, 182 N.Y.S.2d 631 (1959).

[5] See, e.g., Armstrong v. Toler, 24 U.S. 258 (1826); Barry v. Capen, 151 Mass. 99, 23 N.E. 735 (1890); Russell v. Burton, 66 Barb. 539 (N.Y. Sup. Ct. 1867).

[6] See, Barry v. Capen, supra note 5. See also, Hogston v. Bell, 185 Ind. 536, 112 N.E. 883 (1916); Fox v. Rogers, 171 Mass. 546, 50 N.E. 1041 (1898); Russell v. Burton, supra note 5; Traver v. Naylor, 126 Or. 193, 268 Pac. 75 (1928); Howden v. Simpson, 10 Ad. & E. 793, 113 Eng. Rep. 300 (1839). Contra, Interstate Const. Co. v. Lakeview Canal Co., 31 Wyo. 191, 224 Pac. 851 (1924). But subsequent illegal performance is relevant evidence on the issue of the intention of the parties at the time of formation; e.g., Barry v. Capen, supra.

[7] Tocci v. Lembo, 325 Mass. 707, 92 N.E.2d 254 (1950); Nussenbaum v. Chambers & Chambers, 322 Mass. 419, 77 N.E.2d 780 (1948); Reuter v. Ballard, 267 Mass. 557, 166 N.E. 822 (1929).

[8] 56 App. Div. 244, 67 N.Y. Supp. 632 (1900); on rehearing, motion for reargument denied, 57 App. Div. 426, 68 N.Y. Supp. 221 (1901).

[9] Oscanyon v. Arms Co., 103 U.S. 261 (1880); Harrington v. Victoria Graving Dock Co., L.R. 3 Q.B.D. 549 (1878).

[10] Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 N.Y. Supp. 830 (1908); Kraus v. Pacter, 134 Misc. 247, 234 N.Y. Supp. 687 (Sup. Ct. 1929); cf. Merchant's Line v. Baltimore & O. R.R., 222 N.Y. 344, 118 N.E. 788 (1918); Schank v. Schuchman, 212 N.Y. 352, 106 N.E. 127 (1914).

[11] Stone v. Freeman, 298 N.Y. 268, 82 N.E.2d 571 (1948); cf. cases cited note 9 supra.

since illegal contracts and contracts obtained by illegality are not enforced for public policy considerations, the same policy required that it take a further step and hold a legal contract unenforcible when the performance thereunder is illegal. Failure to take this step would have amounted to encouragement of commercial immorality and illegality. In essence the Court refuses to let the plaintiff reap the benefits of his wrongful act. The same approach is advocated by Williston.[12]

Realizing that the decision represents an extension beyond positions previously taken, the court points out that its holding is limited to cases in which the illegal performance of an originally valid contract is central to, or a dominant part of, a plaintiff's course of conduct in performance of the contract.[13] Illegality will not include every minor wrongdoing in performance, but only such illegality as is directly connected with and not merely incidental to the obligation sued upon.[14]

The dissenting opinion[15] of Justice Froessel favors the approach of *Dunham*, a view probably sounder than that of the majority. It is true, as the majority reasoned, that courts should not be required to serve as the paymasters of the wages of crime, and that when the defense of illegality is allowed it is not to relieve defendants of contractual obligations, but to deprive plaintiffs of illegally obtained contractual rights. Unfortunately, however, the decision presents no workable standard. The Court pointed out that it could not announce in advance a rule applicable to all the varying degrees of corruption connected with performance, major and minor, essential and peripheral. Such a situation may well result in increased litigation, a premium being placed on a contracting party's ingenuity in discovering some illegality in the other party's performance. It may indeed prove advantageous to refuse to perform contractual obligations when illegality in the other party's performance has been found because if the courts decide that the illegality is enough to vitiate the contract, the defendant realizes all the contractual benefits without suffering any detriment other than payment of legal fees.

At the least, the decision would seem to foster uncertainty in commercial dealings where confidence and certainty are so essential. The approach here employed would require that each case be decided on its particular facts without the guidance of a definite, workable standard. The results outlined could have been avoided had Justice Froessel's approach been followed, leaving in instances such as this, the state by its criminal proceedings to vindicate any wrongs against public policy which might result.

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12 6 Williston, Contracts § 1761 (rev. ed. 1938).

13 McConnell v. Commonwealth Pictures Corporation, supra note 1, at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487.

14 Ibid.

15 Id. at 472, 166 N.E.2d at 498, 199 N.Y.S.2d at 488.